THE HISTORY OF THE LAW OF NATURE: A PRELIMINARY STUDY.*

Its Continuity.—The term "Law of Nature," or natural law, has been in use in various applications ever since the time of the later Roman Republic. Their variety and apparent diversity have tended to obscure the central idea which underlies them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law. Such a principle, under the name of reason, reasonableness, or sometimes natural justice, is fully recognized in our own system, but the difference of terminology has tended to conceal the real similarity from English lawyers during the last century or more. The neglect of mediæval learning which followed the Renaissance and the Reformation has also caused us to forget that the Law of Nature has a perfectly continuous history down to the date of its greatest and most beneficent achievement—one might almost say its apotheosis—in the foundation of the modern Law of Nations by Grotius. Much that has been written on this subject, even by eminent authors, assumes or suggests that Grotius revived for his own purposes an almost dormant conception of the Roman lawyers. In fact, the Law of Nature, as Grotius found it, was no mere speculative survival or rhetorical ornament. It was a quite living doctrine, with a definite and highly important place in the mediæval theory of society. What is more, it never ceased to be essentially rationalist and progressive. Modern aberrations have led to a widespread belief that the Law of Nature is only a cloak for arbitrary dogmas or fancies. The element of truth in this belief is that, when the authority of natural law was universally allowed, every disputant strove to make out that it was on his side. But such an endeavor would

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obviously have been idle if the Law of Nature had meant nothing but individual opinions. I now propose to give a summary view of the origin and development of the doctrine. The facts are not open to doubt, and any current errors are due to pure oversight rather than to misconstruction.

Aristotle.—Natural law, as conceived by mediæval scholars, was derived partly from the Aristotelian distinction of natural and conventional justice, partly from the Latin exposition, led by Cicero, of the same idea in its later Greek forms, and partly from the still later special adaptation of it by the classical Roman jurists. The distinction was not altogether new in Aristotle's time; for the present purpose, however, the celebrated passage in the fifth book of the Nicomachean Ethics[1]—not from Aristotle's own hand, but certainly Aristotelian in substance—may be taken as the fountain-head. Justice, as a necessary element of the State (*τὸ πολιτικὸν δίκαιον*), is divided into natural (*τὸ μὲν φυσικόν, naturale*) and conventional (*το δὲ νομικόν, legale*). Rules of natural justice are those which are universally recognized among civilized men. Rules of conventional justice deal with matters which are indifferent or indeterminate until a definite rule is laid down by some specific authority. Such are all rules fixing the amount of fines or other money payments. The rule of the road may furnish as good a modern example as any. Reason suffices to tell us that some rule is desirable on frequented roads, but whether we shall take the right or the left hand can be settled only by custom or legislation; and in fact the rule differs in different countries. Thus far Aristotle might seem to be merely noting the fact that some principles of social conduct are admitted everywhere, or at least wherever there is any settled government. But the Aristotelian use of the term "Nature" goes beyond this; it implies the conception of a rational design in the universe, which is manifested, though never perfectly realized, in the material world. This last qualification is important. Aristotle expressly guards himself against asserting that the rules of

[1] C. 7. This is one of the Eudemian books. The Latin equivalents given are those used by St. Thomas Aquinas, from the literal version prepared under his direction.

natural justice, as actually found in human society, are perfectly constant. General uniformity is enough to show that they exist, as the right hand is truly said to be the stronger, although there are left-handed people.

The Stoics.—The Stoics emphasized the teleological and ethical aspects of the Peripatetic doctrine, and fixed on the term "Nature" in this connection the special meaning of the constitution of man as a rational and social being. Every creature has its own nature and its own appropriate functions, and for man—whose nature is to be a citizen—the Law of Nature is the sum of the principles, founded in human nature, which determine the conduct befitting him in his rational and social quality. No term answering to the Latin *ius gentium* is known to occur in Greek philosophy, but the later Stoics at any rate spoke of *νόμος φυσικός* (which Aristotelian usage would not allow), and the original Aristotelian dictum was current in the Middle Ages in the form "Ius naturale est quod apud omnes homines eandem habet potentiam."

The Roman Jurists.—As to Roman usage, it appears that *ius gentium* was old popular as well as legal Latin, and meant the common law or usage of mankind—the rules which, in fact, everybody recognizes.[2] This is very near the *φυσικόν δίκαιον* of the Greeks, taken on the practical and directly observable side. *Lex naturalis* or *naturæ*, *ius naturale*, came in, as deliberate translations of the Greek term, in the last period of the Republic. They must have been neologisms in Cicero's time, for in his earliest work, the *De Inventione*, as in that of the anonymous *Auctor ad Herennium* whom he follows, the idea is found, but is expressed by periphrasis. The law derived from Nature, as there set forth, is identical, as might be expected, with the morality of a high-minded Roman gentleman.[3] We are not concerned here with the technical history of *ius gentium* as part of the Roman system of law, but only with the reason given for its adoption. Obviously no positive authority

[1] Fortescue, *De Laudibus Legum Angliæ*, c. 16.

[2] Nettleship, *Contributions to Latin Lexicography*, *s. v.*

[3] *De Invent.* 2, 53, s. 161: "Natura ius est quod non opinio genuit sed quaedam innata vis inseruit: ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem."

could be assigned; and ancient Roman lawyers were no more willing than modern English ones to admit frankly that they were innovating on grounds of convenience. The Greek doctrine of the Law of Nature furnished exactly the ideal foundation which was wanted, and the classical jurists, perhaps with more aid from lost Greek philosophical works than we can now trace, proceeded to identify *ius gentium* with *ius naturale* for the purposes of legal science.

"*Ius Naturale*" *and* "*Ius Gentium.*"—Strictly speaking, *ius naturale* should signify the rules of conduct deducible by reason from the general conditions of human society; *ius gentium*, so much of those rules as is actually received and acted upon among all civilized people. We have already seen that not even philosophers expected natural justice to be completely realized in this world, nor can I find any evidence that either philosophers or lawyers believed it ever had been, notwithstanding the modern use of such expressions as "the lost code of Nature" with reference to the Roman doctrine. If they ever felt tempted to connect the Law of Nature with the fables of a golden age, they were wise enough to resist the temptation.

Thus a distinction between *ius naturale*, the ideal to which actual law and custom could only approximate, and *ius gentium*, the measure of the practical approximation at a given time, was quite warrantable, if not positively required from a theoretical point of view. Such a distinction, however, is but seldom made by the Roman lawyers, and then in exceptional matter, such as the question of slavery;[1] and modern Romanists appear still unable to agree whether passages of this kind represent a received doctrine or individual speculations. There is no doubt that the terms were treated as synonymous in ordinary cases, and it is not difficult to suppose that in such cases the exceptional ones were not present to the minds of the writers, or the tacit exception of them was left to the reader's intelligence.

The compilers of Justinian's *Institutes* adopted from

[1] The contrast is most strongly put in a fragment of Tryphoninus, D. 12. 6. *De Condict. Indeb.* 64: "Libertas naturali iure continetur, et dominatio ex gentium iure introducta est." It hardly needs pointing out that this is not an Aristotelian view. St. Thomas Aquinas tries to reconcile the earlier and later philosophers by a distinction of great ingenuity. *See Secundæ*, qu. lvii, art. 3.

Ulpian a phrase extending the Law of Nature to all living creatures: "Ius naturale est quod natura omnia animalia docuit."[1] This would seem to be merely a piece of over-ambitious generalization taken from some forgotten Greek writer, perhaps a rhetorician and not a philosopher. It is quite contrary to the Stoic conception of the Law of Nature, where Nature undoubtedly means the reason of the universe as exhibited in the specific moral and social character of man, and "following Nature" means realizing, so far as possible, the ideal of human nature; so that the difference between man and other animals is more important than the resemblances. Ulpian's unlucky phrase is alone in the *Corpus Iuris;* Ulpian himself makes nothing of it beyond saying that rudimentary family institutions may be ascribed to irrational animals, and there is no sign of the notion having had any influence in Roman law. Nevertheless, this passage, having been put in a conspicuous place at the opening of Justinian's *Institutes*, and therefore speaking with the highest authority, has given infinite trouble to commentators. Most mediæval writers felt bound to accept —with more or less qualification, according to their boldness and ingenuity[2]—the threefold classification of *ius naturale*, the rules or instincts common to all animals; *ius gentium*, the rules common to all mankind; and *ius civile*, the particular law of this or that commonwealth.

William of Ockham's Classification.—William of Ockham, one of the boldest, propounded a classification altogether independent of Ulpian. *Ius naturale*, he says, may be taken in three senses: (1) The universal rules of conduct dictated by natural reason; (2) rules which would be accepted as reasonable, and therefore binding, in a society governed (or in any society so far as governed) by natural equity without any positive law or custom of human ordinance; (3) rules which may be justified by deduction or analogy from the general precepts of the Law of Nature, but, not being in fundamentals, are liable to modification by positive

[1] D. 1. 1. *De Iust. et Iure*, 1, 3.

[2] There is some good criticism in Ægid. Rom. *De Regimine Pr.* III. ii. c. 25. (This book is often cited without the author's name; care is therefore necessary to distinguish it from the other work, partly by St. Thomas Aquinas, of like title.)

authority.[1] The "secondary Law of Nature" of later books appears to cover William of Ockham's second and third heads, but may generally be referred to the third. That which modern writers since Rousseau have commonly called the Law of Nature without qualification is nothing else than a one-sided development of the "secondary Law of Nature" as it was understood before the scholastic terminology was forgotten. But we must return to the normal process of mediæval thought on the main lines of the subject.

Influence of the Revival of Learning.—About the beginning of the twelfth century the revival of Latin learning, which is not unjustly called the "Lesser Renaissance," was fully as active in legal and political speculation as in other directions. The more exciting and more easily intelligible controversies of the sixteenth century have obscured the importance of this movement for latter-day readers. John of Salisbury may be taken as its typical English champion. It culminated, a century and a half later, in Dante. When we call it a revival of Latin learning, we include not only the study of Roman literature and the Roman law, but the study of Greek antiquity and philosophy so far as accessible through Latin. Indeed, there is reason to think that knowledge of Greek, in the thirteenth century at any rate, was not so very rare as has been commonly supposed. We have to remember that, for the mediæval history of the Law of Nature, Aristotle is not less important than Justinian, and Cicero's authority does not come far behind.[2] The heathen philosophers had been so much quoted and

[1] Dial. pars. III., tr. ii. l. 3, c. 6, at p. 932, in Goldast, *Monarchia*, tom. ii. There is an express claim of originality; the Student says: "Istam distinctionem iuris naturalis alias non audivi."

[2] See the Ciceronian passages collected in K. Hildenbrand, *Geschichte u. System der Rechts- u. Staatsphilosophie*, i. 564. (This volume seems to be all published.) The fragment of the *De Republica* preserved by Lactantius probably had more influence than any one passage in the jurists. As it is constantly referred to, it may be convenient to give the leading phrases here: "Huic legi nec abrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest: nec vero aut per senatum aut per populum solvi hac lege possumus; neque est quærendus explanator aut interpres eius alius: nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac," etc. (*De Rep.*, III., 22.) The use of the word "lex" involves the idea of rational design, and is justified by it, otherwise it would not be Latin.

approved by Fathers of the Church that they stood in the eyes of mediæval scholars on almost as high a level of sanctity as an orthodox emperor. When the age of chaos was past, and the lawyer and the statesman, after many generations, once more had the means of being humanists, the Law of Nature presented itself with twofold and threefold claims to allegiance. Its authors and vouchers carried a weight second only to that of the law of God as declared by the authority of the Church, evidently the Law of Nature could not be left out in any systematic discussion of human conduct. Any serious attempt to disparage it was no less out of the question. Even the Church could not afford to set herself against Aristotle, Cicero, and Justinian. The Law of Nature was too firmly in possession to be evicted. Yet the Church had to maintain her supremacy, as custodian of the divine law, in matters of faith and morals.

The Law of Nature identified with the Law of God.—Only one way was possible. The Romans had already identified their *ius gentium* with the Law of Nature; the process must be carried a step farther by identifying the Law of Nature with the law of God. Philosophers had already used language which pointed that way. The step was taken in the twelfth century, by the author or authors of the *Decretum* of Gratian, and with a thoroughgoing boldness which almost deserves the name of genius.[1] At the very head of the *Decretum*, therefore at the very head of the body of Canon Law as since collected, we read that the Law of Nature is nothing else than the golden rule, comprised in the Law and the Gospel, which bids us do as we would be done by, and forbids the contrary. It is supreme over all kinds of law by antiquity and dignity; it is immutable; it prevails over both custom and express ordinance. Here, it would seem, English lawyers must be content to find the origin, both of the maxim, still received, that a custom cannot be

[1] I have looked into the best known manuals of Canon Law before Gratian (Regino of Prüm, Burchard of Worms, Ivo of Chartres) with the aid of the excellent indices to them in Migne's *Patrologia*, rather expecting to find the doctrine in an earlier stage, but have found nothing like it. Apparently Gratian makes a wholly new departure. There is reason to believe that the *Decretum* was strongly influenced by Abelard (see Thaner, *Abälard und das canonische Recht*, Graz, 1900); but whether there be anything to our immediate purpose in Abelard I must for the present leave to be verified by better mediævalists than myself.

good if it is contrary to reason, and of the doctrine—now rejected but current (though never put in any effectual practice) in the sixteenth and down to the eighteenth century—that a statute may be held void for being repugnant to reason or "common right." The Law of Nature, however, is not absolutely co-extensive with the law of the Church or with the rules revealed in Scripture. For even revealed precepts, though of unquestionable authority, may and often do deal with matters not fundamental in themselves, but appertaining to ceremonial and positive regulation. It is assumed, rather than directly laid down, that the Church is the authentic exponent and interpreter of natural law. The assumption, however, is obviously required by reasons of discipline. It would never do for bishops and archbishops to claim practical independence under pretense of following the rule of natural reason at their own discretion. But the Law of Nature in the hands of an ultimate authority may be an effective solvent in many cases. A bishop who obstinately relies on a local custom against the general usage of the Church will find himself kicking against the pricks, not merely of official superiority, but of a law which he must needs recognize as paramount.[1] Truth before custom: had not Augustine said it? Thus the Law of Nature, as the eldest branch of the divine law, goes hand in hand with the no less divine authority of the Church to judge all the earth and do right. Such is, in outline, the system which has never been substantially departed from by orthodox canonists. It is true that the *Decretum* of Gratian has not, in Canon Law, the same binding force as the later Decretals.[2] But if authority were wanting to Gratian's enthronement of the Law of Nature, it was amply supplied by Aquinas, who set his stamp on the doctrine in the next century.

St. Thomas Aquinas.—The relation of natural law to divine law in general is more fully defined by St. Thomas; they are not substantially different, but natural law is divine law so far as revealed through the medium of natural reason

[1] If any one should think the reinforcement superfluous, let him remember that the discipline of the Church in the middle of the twelfth century was not what it is now, or what it had become even a century or two later.

[2] See F. W. Maitland in 2 *Encycl. Eng. Law*, 356, 357.

"participatio legis æternæ in rationali creatura."[1] This identification was carried over by the glossators into the teaching of Civil as well as Canon Law. Thus Azo explains Ulpian's *natura*, in the perplexing dictum already mentioned, by *id est ipse Deus*.[2] It is needless to dwell farther here on the passages of St. Thomas Aquinas touching the Law of Nature, as they have been cited by recent English writers (Professor Holland and others) and are comparatively well known. Mediæval writers often speak for brevity's sake of divine law, without qualification, when they mean specifically revealed rules of conduct, and of positive law when they mean positive or conventional rules of human ordinance. Hence a current division of all law into divine, natural and positive, where the first and last of these epithets must be understood to be used in the compendious manner just explained, and not to imply ignorance or doubt of the propositions, perfectly well known to the writers, that all natural law is divine, and some divine law is positive.[3]

"*Deus Finem Naturæ Vult.*"—The full adoption and glorification of natural law by the *Decretum* of Gratian was, as above said, a master-stroke of policy. We may doubt whether it aimed so high as securing supremacy for the Church over the temporal power, or making the Church the arbiter in questions of secular government. Designs of that magnitude were then hardly formed. The Church was clearly bound to uphold the fundamentals of Catholic faith and morality against all earthly powers; we need not suppose that Gratian intended to go farther. At all events, there was no way of making political speculation wholly subordinate to theology. It was not long before ingenious controversialists discovered that the supremacy of the Law of Nature was a double-edged weapon. For the Law of Nature, by its very definition, was a rule of life

[1] *Prima Secundæ*, qu. xci., art 2.

[2] See F. W. Maitland, *Bracton and Azo* (Seld. Soc., 1895), at pp. 32, 33.

[3] Selden's brief remarks in his *Table Talk*, s. v. *Law of Nature*, seem to ignore these distinctions. Denial of any natural law apart from a specially sanctioned revelation appears to be the substance of the dictum as reported. But this would make Selden more Hobbist than Hobbes himself, and we cannot suppose that he would have expressed his considered opinion in such terms.

and society discoverable by human reason apart from any special revelation or the decision of any particular authority. When discovered, again, it was admitted to be absolutely binding. Natural law could not be in conflict with divine law, for it was part of the divine law. The intentions of Nature, as philosophy calls them, are nothing else than the intentions of the Creator. As Dante puts it:[1] "Manifestum est quod Deus finem naturæ vult." So William of Ockham: "Omne autem ius naturale est a Deo qui est conditor naturæ."[2] Whatever, therefore, reason can establish as part of natural law may be used as a touchstone for propositions enounced by any particular person or body and purporting to be deduced from the specially revealed part of God's law. Such propositions, if contrary to natural law, must be erroneous. Nor could theologians or official persons of any kind claim a monopoly of natural reason. Even if the Church were the ultimate interpreter, the authentic voice of the Church could be found only in a General Council; for in the Middle Ages the infallibility of the Pope, so far from being a dogma, was barely allowed to be a plausible opinion. Thus a wide field of speculation was kept open, and guarded by the Law of Nature, through the action of the Church herself. Not even a William of Ockham could think of going behind the notorious elements of orthodox belief; and, indeed, the Law of Nature could obviously have little application, if any, to purely theological argument. But, apart from the fact that some dogmas, or opinions which have since become dogmas, were still plastic, there was much to be done without any such extreme adventure. There were a great number of questions interesting to both Church and State, such as we now call constitutional, which remained legitimately open. One might not derogate from the law of God as expressed in Scripture and laid down by the Church. But in the case in hand the revealed law of God might be wholly silent, or it might be ambiguous, or authentic texts admitted or alleged to be applicable might be capable of widely differing interpretations. When once there were plausible grounds on either side and no decisive authority, the Law of Nature—

[1] *De Monarch.*, 3, 2.
[2] Dial. III., ii. 3, c. 6, at p. 934, in Goldast, *Monarch.*, t. ii.

like the king's ultimate power of doing justice in default of an adequate ordinary jurisdiction—could always be invoked by way of supplement. It might furnish a rule where no rule had been declared, or might guide interpretation where the application of the rule was not certain. Moreover, as we have pointed out, it was not free to a mediæval disputant to traverse the authority of the Law of Nature itself, but only to deny the correctness of the adversary's formulation or application of its rules in the particular case.

Pope and Emperor.—A weapon of controversy so tempting and lying so ready to hand could not fail to be freely and eagerly wielded. In fact, we find the Law of Nature, through the Middle Ages and down to the Renaissance, called in aid of many and various contentions, sometimes on the side of the opinions most favored in high places, but as often on the contrary. Most chiefly it was an inexhaustible topic in the standing controversy for dominion between the Empire and the Papacy. Rival claims to supreme jurisdiction, urged with abundance of plausible authority on behalf of potentates who owned no common earthly superior, furnished exactly the field in which the Law of Nature might be used with brilliant dialectic effect as a *deus ex machina.* So the champions on on either side constantly endeavored to turn the scale by demonstrating to their own satisfaction that the Law of Nature supported, as their case might be, the pope or the emperor. Imperialist arguments were not wanting in boldness. William of Ockham maintains that the people of Rome have probably a divine, certainly a natural, right to elect their own bishop, and appeals with confidence to natural reason to show that a heretical or otherwise incorrigibly evil pope may lawfully be deposed.[1]

On all hands it was admitted, even by extreme partisans, that both pope and emperor were subject to the Law of Nature, though it might be and was urged that one or the other of them was more likely to form a correct judgment

[1] Goldast, *Monarch*, ii. 568, 934. William of Ockham's dialogue is printed, along with Marsilio's *Defensor* and other Imperialist works, in this enormous volume. I do not know of any more convenient edition as easily accessible.

as to what its dictates were. As the champions of the Curia suggested or assumed that the official head of the Church was the best exponent of natural law, so the Imperialists maintained that it was the safe course to follow the emperor's judgment in case of doubt, and rash to dispute it unless it were so contrary to settled principles as to be manifestly erroneous.[1] English lawyers accustomed to weighing the relative authority of decisions will readily see how natural and indeed inevitable these positions were in controversy where jurisdiction was the principal or only matter really in difference.

"*Communis Utilitas.*"—It was no less inevitable that the appeal to the Law of Nature as the ultimate ground of decision between the conflicting claims should often become indistinguishable, to modern eyes, from a pretty frank appeal to expediency. We find even the language of modern utilitarianism anticipated, for *communis utilitas* is a quite current term. If Bentham had known what the Law of Nature was really like in the Middle Ages, he would have had to speak of it with more respect. It has been pointed out before now that in any case utilitarianism is just as much a system of natural law as any other dogmatic system of ethics, or politics. Indeed the political principles of the Imperialist doctors come very near to the well-known theistic form of utilitarianism, according to which utility is the test of right conduct because God wills the happiness of his creatures.

Practical Application.—The Law of Nature being for the most part an engine of dialectic, we have no cause to be surprised at not finding much mention of it by name in official and authoritative documents. On occasion, however, it might serve the purpose of a prince who wished to assign imposing reasons for a bold reform without derogating from his own supremacy. Thus Philip the Fair of France in 1311 rested the enfranchisement of the bondmen on the Valois domain upon freedom being the natural birthright of man, and brought in the common profit of the realm (following the utilitarian tendency noted above) as a secondary motive. "Comme créature humaine qui est formée à

[1] "Error principis probabiliter ius facit"; William of Ockham, Goldast, *op. cit.*, at p. 924.

l'image Nostre Seigneur doie generalement estre franche par droit naturel et en aucuns pays de cette naturelle liberté ou franchise par le jou de servitute qui tant est haineuse soit si effaciée et obscurcie . . . nous meus de pitié pour le remede et salut de nostre ame et pour consideration de humanité et de commun profit," etc.[1] The example was followed by Philip's son, Louis Hutin. A high authority has seen here a misunderstanding or misapplication of the Roman dictum, "Omnes homines natura æquales sunt."[2] But in the first place it is not clear that there is any reference to Roman secular law. The tone of this preamble is more ecclesiastical than civil, and the Church had always stood for freedom and favored manumission. Again, it was considered perfectly fair throughout the Middle Ages to apply any text of authority in any sense it could be made to bear, without regard to what the original historical sense might have been. The more authoritative the text, the more applications were presumably to be discovered in it; and the most far-fetched use of a text is no proof that the writer had misunderstood its primary meaning. Besides, if Roman texts are in question, there are express dicta in the *Digest* to the effect that the Law of Nature does not recognize slavery, and it would be enough to rely on these without saying (as the ordinance does not say) anything about equality. I do not know whether it was open to a French lawyer in the fourteenth century to argue that a wholesale emancipation of this kind was beyond the power of the Crown, or, though not invalid, censurable on constitutional grounds. If any such objection could be expected, nothing could be more aptly framed to meet it than the king's appeal to the Law of Nature as the paramount reason of public policy.

The Reformation Controversies.—In the sixteenth century the controversies incident to the Reformation gave a singular impulse to speculative political discussion. It would be difficult to name any modern theory of sovereignty of the State, or of the origin of society, which is not anticipated

[1] *Ordonnances des Rois de France de la troisième Race*, xii. 387. Maine, *Ancient Law*, 94, refers only to Louis Hutin's later ordinance.

[2] Maine, *l.c.*

somewhere in this mass of polemics;[1] and in particular the foundation of civil government was quite commonly referred to some kind of contract. The terms of the contract, and still more its implied conditions, varied according to the opinions of the disputant. But this did not materially affect the importance of natural law. For, since the original contract had in general no historical existence (however the ingenuity of dialectic might strive to disguise this), its terms could not be proved as a matter of fact. They could, therefore, only be presumed to be what they ought to have been; and what they ought to have been was eminently a question of natural law. More than this, it was a prevalent opinion that the original contract itself was of the nature of positive law, and subject to the Law of Nature, like all other branches of law. This or that particular State might be instituted by convention; but a State being once established, its rights and powers, it was said, were determined by principles of natural right paramount to all conventions.[2]

The various controversial exigencies of the Reformation and the Catholic counter-Reformation produced endless divisions and cross-divisions among Catholic and Protestant publicists, unexpected or even paradoxical in a modern reader's eyes. We find Dominican and Jesuit champions of the Papacy deliberately referring the foundation of the State to natural reason alone, in order to deprive the prince of any claim to spiritual jurisdiction. This, with the *Decretum* of Gratian still claiming respect, was a perilous line of argument. Again, the principles of the Law of Nature were invoked to moderate the letter-worship of the Reformers; the text of Scripture, the Catholics said, must be taken with, and subject to, the universal principles discoverable by reason, and construed in a manner consistent with them.[3]

[1] This is well noted by Professor Brissaud, of Toulouse, in his interesting study of the liberal movement in France (*Un Libéral au XVII^e Siècle; Claude Joly*, 1607–1700; Paris, 1898), p. 5: "Si l'on se reporte par la pensée à la fin du seizième siècle, on est tout surpris de trouver, au lieu d'une seule foi politique, une véritable mêlée des esprits; théorie du contrat social, théorie de la souveraineté populaire, systèmes aristocratiques, ou même démocratiques, c'est une confusion extrême."

[2] Authorities and references in Gierke, *Johannes Althusius, passim*. As to the last-mentioned point, see at pp. 105, 106.

[3] So, in England, Pecock (*Repressor*) as early as 1455.

Further, and this comes very near modern methods, it was sought to assure the sanctity of property and contract, including the supposed original contract itself, by representing those institutions as part of the immutable Law of Nature; this view was substantially adopted by Grotius, and has largely entered into modern economic doctrine. The process was made more plausible by identifying the *ius gentium* of the *Corpus Iuris* with the Law of Nature of the canonists. There were even those who dared assert that "Deus ipse ex promissione obligatur."[1]

The Sovereign Power and Natural Law.—One much agitated topic was the relation of sovereign power to natural and positive law. No doubt was entertained but that the Law of Nature was in some sense above all earthly potentates. This did not obviously decide the question whether a subject could in fact be justified in disobeying his lawful sovereign's commands as being contrary to the Law of Nature.[2] It was admitted that merely consequential or "secondary" rules of natural law, which might be binding in the absence of positive enactment, could be modified or restrained by positive law. St. Thomas was decisive on that point.[3] Subject to this distinction, however, it was the prevalent mediæval opinion that commands of the prince contrary to the Law of Nature were not binding on his subjects and might be lawfully resisted—a doctrine sometimes tempered by advising the subject to presume, in case of reasonable doubt, that the prince's judgment was right. A more dubious question was whether sovereign power was subject to positive as well as natural law. Did the imperial *potestas legibus soluta* belong of right to all independent sovereigns? In other words, were they the fountain of positive law and above it? There was good authority for saying so.[4] But it was also vigorously maintained that the ruler could be guilty of a breach of positive as well as

[1] Gierke, *op. cit.*, 270, 271.

[2] No subject, of course, could be bound by his allegiance to commit a breach of manifest elementary rules of faith or morals. Cases of that kind are outside the argument.

[3] *Sec. Secundæ*, qu. lvii., *De Iure*, arts. 2, 3,

[4] "Positiva lex est infra principantem sicut lex naturalis est supra." Ægid. Rom. III. 2, c. 29. This, with the caution that "principaus" is the king in Parliament, has long been the accepted English constitutional doctrine.

natural law, full sovereignty being reserved to the people, or in spiritual matters to the congregation of the faithful. Before the Reformation, Marsilio of Padua was the leading champion on this side.[1] This is the distinction of "organic" or "fundamental" from ordinary institutions. It is possible to argue, as Hobbes in effect did later, that such a distinction is incompatible with the Law of Nature. At this day it exists in a large majority of civilized commonwealths.

Reversion to the Civil Law.—As Protestant writers did not accept the authority of the Church, of the Canon Law, or of Aristotle, and the Roman disputants of the counter-Reformation were anxious to confute the Protestants on their own ground, the tendency of sixteenth-century controversy, as well as of Renaissance learning in general, was to bring the texts of classical Roman law into greater prominence. Thus a more definitely secular and legal cast was given to the whole treatment of the Law of Nature, and the way was prepared for the great construction of Grotius. Not that Grotius has anything disrespectful to say of the mediæval doctors. On the contrary, he ascribes the greatest weight to their agreement on questions of moral principle; when they are found unanimous on such questions, their opinion is more than probable: "ubi in re morum consentiunt, vix est ut errent."[2]

The Law of Nature in England.—Here we may leave the Law of Nature ready to achieve its development into the modern Law of Nations, and turn to its fortunes in our own country. The Canon Law, as we have seen, was the principal vehicle of the Law of Nature, and canonists were anything but popular among English laymen. In politics they were associated with attempts to encroach on the king's authority for the benefit of foreigners, in common life with the meddling and vexatious jurisdiction of the spiritual courts. Talking of the Law of Nature, therefore, was not a good way to most English ears, and it is not strange that we find little about it in English authors. William of Ockham, of whom we may justly be proud as our countryman, can still hardly be counted for this purpose. There is nothing particularly English about his career or his work;

[1] Gierke, *op. cit.*, 266.

[2] *De Iur. B. et P. Prolegg.*, s. 52.

he is cosmopolitan, like all the great mediæval doctors.

One English royal judge, Sir John Fortescue, did commit himself a century later to treating of the Law of Nature by name, but the case is in every way exceptional. His book, *De Natura Legis Naturæ*, was a plea for the Lancastrian title to the crown of England, addressed to Continental readers in the hope of obtaining Continental support. It is at best the artificial performance of a champion wielding unfamiliar arms in a strange field. Compared with the work of trained dialecticians, it is of slight interest and of no value.[1] What little is said of the Law of of Nature in Fortescue's principal and really interesting book, *De Laudibus Legum Angliæ*—a book also intended, it would seem, for Continental readers—is ornamental, and of no greater importance.

We might expect to find the mark of the regular scholastic doctrine in the early history of the Court of Chancery, but there are only occasional references to law *and reason*—we shall see the importance of this term presently as the standard of decision. The current form, "for God and in the way of charity," is an appeal to the divine law of the Church rather than to natural law properly so called. Express invocation of the Law of Nature seems rather to have been purposely avoided. Probably it was felt that it would do more harm than good. The king's discretion was understood to be supreme in "matters of grace," and especially large wherever the profit of the Crown, or the rights of any one claiming by grant from the Crown, were affected. Any deduction of it from the Law of Nature would have looked like an attempt of canonical formalists to regulate the king's prerogative in some outlandish fashion of their own. After the Reformation it was a harmless exercise to identify the Chancellor's equity with the Law of Nature or with a Roman prætor's jurisdiction. I do not know of any example earlier than the seventeenth century.[2] Moreover, the administration of equity in anything like the modern sense was, in the fourteenth and

[1] Mr. Plummer's account in his introduction to *The Governance of England*, at pp. 82-84, is enough for most purposes.

[2] See Malines, *Lex Mercatoria* (A.D. 1656), 311.

fifteenth centuries, by no means the sole or chief business of the Court of Chancery.

The Law Merchant.—For distinct English recognition of the Law of Nature we must look to such law and jurisdiction as had an avowed cosmopolitan character, and principally to the law merchant.[1] This was always understood to be founded on general reason and convenience, evidenced by the usage of merchants. "The law merchant, as it is a part of the Law of Nature and Nations, is universal and one and the same in all countries in the world."[2] In 1473, it was said by Stillington, Edward IV.'s Chancellor, in the great case of larceny by a carrier "breaking bulk," that the causes of merchant strangers "shall be determined according to the Law of Nature in the Chancery." Foreign merchants put themselves within the king's jurisdiction by coming into the realm, but the jurisdiction is exercisable "*secundum legem naturæ* que est appelle par ascuns ley marchant, que est ley universal par tout le monde."[3] It is said that the practice was to refer such causes to merchants by commission from the Chancellor.[4] In the ordinary jurisdiction of the king's courts we find a trace, but only a trace, of common lawyers envying the dialectic resources of the civilians and canonists. Yelverton said that he did not see why, in the absence of authority, the king's judges should not also "resort to the Law of Nature, which is the ground of all laws."[5] It is just possible that some design for enlarging the king's power through judicial discretion was at the bottom of this; it is all but certain that in the following century Henry VIII. had a plan to compass the same end by favouring the study of the Civil at the expense of the Common Law. Nothing came of it in either case, and the Tudors

[1] The law of the Admiralty stood too much apart to be specially considered here. There were mutterings of insular pride against its cosmopolitan jurisprudence as early as the fourteenth century. See the very curious gloss quoted in Maitland's *Bracton and Azo* (Seld. Soc., 1895), at p. 125.

[2] Sir John Davis, *Concerning Impositions*, c. 3, "dedicated to King James in the latter end of his reign," first printed 1656.

[3] Y.B. 13 Ed. IV., 9, pl. 5.

[4] Malines, *l.c.* In the thirteenth and fourteenth century suits between merchants could be pleaded in the king's ordinary courts according to law merchant. Y.B. 21 and 22 Ed. I., 75; 32 and 33 Ed. I., 377.

[5] Y.B. 8 Ed. IV., 12.

showed their wisdom by working out their practical despotism in other ways and under more national forms.

"*Law of Kind.*"—Theological and political tracts of the fifteenth century[1] just enable us to say that the proper English translation of *ius naturale* was "law of kind." "Doom of natural reason" is used as a synonym, and we have also the fuller expressions, "moral law of kind, which is law of God" (the regular equation of *ius naturale* with *ius divinum*), "law of kind, which is doom of reason and moral philosophy."

Calvin's Case.—We do find the Law of Nature making a considerable figure in the argument of two well-known cases of the late sixteenth and early seventeenth century—*Sharington* v. *Strotton* (the case of "Uses" in Plowden), and *Calvin's* case (the *post nati*), 7 Co. Rep., 12 *b*. Both of these were highly exceptional, of the first impression, and argued throughout on general principle. As already hinted, there was no longer any risk in using the Law of Nature to adorn an argument, and the new learning of such civilians as Alberico Gentili was making it fashionable again. No light is thrown by such peculiar examples on the usual habit of mind of English lawyers.

The Law of Nature and the Common Law.—But there is a real link between the mediæval doctrine of the Law of Nature and the principles of the Common Law. It is given by the use—correct in both systems, though constant, indeed exclusive, in the Common Law, and rather sparing in the Canon Law—of the words "reason" and "reasonable." This was pointed out in the first quarter of the sixteenth century by that very able writer, Christopher St. German, who must have been at least a fair canonist as well as an excellent common lawyer. In the preliminary part of *Doctor and Student*, after the Doctor has expounded the species of law according to the regular method of the schools, the Student gives the law of reason as the first of the general grounds of the law of England, and, in answer to the Doctor's inquiry where he puts the Law of Nature, explains that in the Common Law that term is not in use, but that where the canonist or civilian would speak of the Law of

[1] Pecock, *Repressor; Dives and Pauper*, printed 1536.

Nature, the common lawyer speaks of reason. Once pointed out, the analogy is obviously just, and a real connection at least probable, for we are not to suppose that the judges and serjeants never knew any more of what the canonists were doing than is disclosed by the Year-Books. In our own time, before the Judicature Acts, it was the judicial etiquette of Common Law and Equity judges to assume, whether they had it or not, a more than modest ignorance of one another's doctrines. Yet this striking passage of St. German has been completely overlooked in modern times. It would be easy not to discover from current accounts of it that the *Doctor and Student* was anything more or other than a text book of Common Law. We can account for this only by the Reformation having broken up the scholastic tradition, and made it the fashion to despise the Middle Ages. Sir Henry Finch, writing early in the seventeenth century[1]—say in the third generation from St. German—had quite lost the thread; what he says of the Law of Nature is mere confusion. He actually makes out the law of reason (by which he seems to mean something approximating to the "secondary" natural law of the schoolmen) to be something different. Not a lawyer, but a divine, Hooker was the latest English writer who maintained the tradition substantially on its accepted lines, though not without variations and expansions which seem to be his own.[2] An English reader in search of a general exposition of the Law of Nature as understood down to the Renaissance might, indeed, do well enough to take Hooker for his guide.

Hobbes, Etc.—Hobbes retained the names of natural law and natural right, and (contrary to what is sometimes said by writers who have not studied him adequately) his language as to natural laws being immutable and eternal is as strong as anything to be found in orthodox publicists. But by defining *lex naturalis*[3] with reference to self-preservation as the only guiding principle, he broke away from previous authority to work out a method all his own. The practical

[1] *Discourse of Law*, first published 1613.

[2] *Eccl. Pol.*, bk. i, cc. 2, 3, 8, 9, 10. 12.

[3] *Leviathan*, c. 14,. Hobbes' *ius naturale* is not a rule at all, but every man's natural liberty to use his own power for his own advantage.

contents of Hobbes' morality are, nevertheless, not very different from other people's, nor was his political system without forerunners. But this does not concern us here. Richard Cumberland, Bishop of Peterborough, went about to refute Hobbes in the name of the Law of Nature (1672), but he made no attempt to return to mediæval lines. As to authority, he tries to get a fresh start from the Roman lawyers; as to principles and methods, he is (as Hallam justly observed) a precursor of the modern utilitarians. By his time the scholastic Law of Nature had finally ceased to count in English speculation. In France it fared no better, if we may judge by Montesquieu, who had lost the historical tradition as completely as any insular moralist. He supposed the Law of Nature to consist only of such rules of conduct as would be applicable in default of any settled government[1]—that is, in the fictitious "state of Nature," with which the original Law of Nature had nothing to do.

The Modern Form of the Doctrine in England.—But the Law of Nature was not dead; it was only transformed into a shape more available for making conquests in the modern world. Its doctrine, purged of clericalism, had been assimilated, through Grotius and his successors, by the modern Law of Nations, and had thus become part of the common stock of eighteenth-century publicists. In that form it was accepted without demur by rationalist philosophers who would have scorned to be knowingly beholden to the Middle Ages. From the Continent it came back to England, rather as an appanage of polite letters than as a constituent of technical jurisprudence. Blackstone made use of it at second or third hand to ornament—though merely to ornament—the introductory chapters of his *Commentaries*. Lord Mansfield took up the rationalizing movement as a practical reformer, and under his guidance it left permanent marks on more than one branch of English law. From the *Decretum* of Gratian to the equitable application of the "common counts," on grounds of "natural reason and the just construction of the law,"[2] and the full recognition of the law merchant in the king's courts, may seem a long way.

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[1] *Esprit des Lois*, l. 1, c. 2.

[2] Blackst., *Comm.*, iii. 161.

The journey was certainly roundabout; but there is no real break in it.

There is much to be said of the function of natural or universal justice, including the idea of reasonableness in its various branches, in the later developments of our system. In particular an important part has been played by natural law, under the name of "justice, equity, and good conscience," or otherwise, in the extension of English legal principles under British political supremacy, but beyond English or Common Law jurisdiction. But this topic is large enough to deserve separate consideration.

FREDERICK POLLOCK.